98TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 98-541

SMALL BUSINESS COMPETITION FOR FEDERAL PROCUREMENTS

NOVEMBER 12 (legislative day, NOVEMBER 10), 1983.—Committed to the Committee of the Whole House on the State of Union and ordered to be printed

---

Mr. MITCHELL, from the Committee on Small Business, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 2133]

The Committee on Small Business, to whom was referred the bill (H.R. 2133) to amend the Small Business Act, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) are as follows:

On the first page, line 3, strike out "That section" and insert in lieu thereof "Section 1. Section".

On the first page, strike out line 9 and all that follows through page 2, line 4, and insert in lieu thereof the following:

> (ii) make such referral discretionary with such officer on any basis including, but not limited to, the anticipated dollar value of the contract, or the nature of the work to be performed: *Provided,* That nothing contained in this paragraph shall require the ad-.

Page 3, line 12, after "thereof," insert "which is not suitable for award pursuant to subsection (a) of section 8".

Page 3, line 17, strike out "and (B)" and insert in lieu thereof "; (B)".

Page 3, line 18, after "reasonable prices" insert "; and (C) delivery of the goods or services will be rendered within the time needs of the procuring agency".

31-081 0

H723-9

Page 3, line 21, strike out "matter" and all that follows through line 23 and insert in lieu thereof the following: "Administrator shall submit the matter for a final determination to the officer or employee of the procuring agency who was appointed pursuant to subsection (k).".

Page 5, after line 11, insert the following:

(4)(A) Within one-hundred eighty days after the effective date of this paragraph, the Office of Federal Procurement Policy (or any successor agency) shall promulgate rules and regulations defining 'legitimate proprietary interest' for purposes of this subsection. Such rules and regulations shall be promulgated as a part of the Federal Acquisition Regulations and shall give due consideration to the following—

(i) Statements of policy, objectives, and purposes contained in Public Law 96-517, Public Law 97-219, and section 8(d) of this Act;

(ii) The governmental interest to increase competition and lower costs by developing and locating alternative sources of supply and manufacture;

(iii) Directing appropriate purchasing agencies to establish reverse engineering programs which provide domestic small business concerns an opportunity to purchase or borrow spare or replacement parts from the government for the purpose of design replication or modification to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the government: *Provided,* That nothing contained in this clause shall limit the authority of an agency head to impose restrictions on such a program related to national security considerations, government inventory needs, the improbability of future procurements for the same or like parts, or any additional restrictions otherwise imposed by law;

(iv) The rights to technical or other data which is developed in whole or in part with Federal funds;

(v) A requirement that the procuring agency, with respect to each major system acquisition, insert a clause in the initial production contract pertaining to technical or other data developed in whole or in part with Federal funds. Such clause shall contain provision specifying, as appropriate, the government's right to own, license, use or otherwise access such data and the extent, if any, of proprietary interest maintained by the contractor; and

(vi) The imposition of appropriate remedial measures against business concerns which improperly designate technical or other data as proprietary.

(B) The Administrator of the Office of Federal Procurement Policy (or the head of any successor agency) shall—

(i) Consult with representatives of associations representing small business concerns prior to issuing any rules or regulations pursuant to subparagraph (A); and

(ii) After the promulgation of such rules and regulations, submit to the Committees on Small Business of the House of Representatives and of the Senate a report detailing how such rules and regulations give due considerations to the factors described in (A)(i) through (vi).".

Page 5, line 12, strike out "(4)" and insert in lieu thereof "(5)".

Page 6, line 18, strike out "within" and insert in lieu thereof "in or near".

Page 6, line 21, strike out "32A" and insert in lieu thereof "44".

Page 7, line 13, strike out "in" and insert in lieu thereof "in or near".

Page 7, line 19, strike out "in" and insert in lieu thereof "in or near".

Page 8, line 5, strike out "within" and insert in lieu thereof "in or near".

Page 8, line 15, strike out "within" and insert in lieu thereof "in or near".

Page 9, line 6, strike out "paragraphs (4) and (5)" and insert in lieu thereof "paragraph (4)".

Page 9, strike out line 9 and all that follows through page 10, line 12, and insert in lieu thereof the following:

(4) Goals established pursuant to this subsection shall be established within the first sixty calendar days of the fiscal year to which they pertain. If goals are not established within such time period for an individual agency, the administration shall set the goals for such agency: *Provided,* That in no event shall any goal established pursuant to this paragraph be less than the goal for the immediately preceding fiscal year.

Page 11, after line 18, insert the following:

SEC. 6. Nothing contained in this Act shall be construed as amending, modifying or superseding the provisions of the Javits-Wagner-O'Day Act (41 U.S.C. 45–48c).

THE PURPOSE OF THE BILL

The purpose of H.R. 2133 is to clarify and expand presently existing programs and policies contained in the Small Business Act that are intended to increase competition by increasing the involvement of small business in the Federal procurement process.

Statistics compiled by your Committee provide compelling justification for further legislative intervention in this process.

The share of the Federal prime contract dollar awarded to small business is disproportionately low. According to data supplied at the request of your Committee, from the Federal Procurement Data Center, of the $475 billion of Federal contracts awarded over the last four and one-half years, small business received only $80.6 billion—or a mere 17-percent of the total. However, by Federal definition, over 98 percent of all business establishments are classified as small.

Statistics also indicate that this trend is worsening. The Department of Defense (accounting for approximately 80 percent of the

Federal purchase dollar) reports that the percent of prime contracts awarded to small business has fallen from 20.8 percent in fiscal year 1979; to 20.4 percent in both fiscal year 1980 and fiscal year 1981; to 19.7 percent in fiscal year 1982; and to 17.4 percent through the first eleven (11) months of fiscal year 1983.

Evidence further indicates that Federal procurements are highly concentrated in the hands of a few large business concerns. In fiscal year 1982, the top 25 DoD prime contractors accounted for nearly 46 percent of the entire purchase dollar; the top 5 prime contractors accounted for 19.6 percent of the budget, or nearly the same amount that was awarded to all small business concerns (19.7 percent).

This bill is intended to reverse these negative trends. The increased utilization of small business will promote competiton, reduce acquisition cost and maintain the Nation's full productive capacity. It is for these purposes that H.R. 2133 was introduced and favorably considered by your Committee.

Introduction and Background

The bill, H.R. 2133, was introduced by full Committee Chairman, Parren J. Mitchell, and originally co-sponsored by Representative Joseph P. Addabbo. At the time of filing this report, the bill had a total of 42 co-sponsors.

The bill was solely referred to your Committee and, subsequently, referred to its Subcommittee on General Oversight and the Economy, Chaired by Representative Berkley Bedell.

The Subcommittee conducted hearings on October 5 and 6, 1983 in Washington, D.C., and on October 12, 1983 in Jamestown, N.C.

After careful and extensive review of additional materials, data, and investigative reports made available to the Subcommittee, mark-up was conducted on October 27, 1983. The Subcommittee favorably reported H.R. 2133, with amendments, by a unanimous vote (11–0) of those Members present.

The full Committee met on November 3, 1983 and by a vote of 37–1 ordered the measure favorably reported, as amended by the Subcommittee on General Oversight and the Economy.

The Need for the Legislation

(A) THE CERTIFICATE OF COMPETENCY PROGRAM

Section 8(b)(7)(A) of the Small Business Act authorizes the Small Business Administration to certify the capability and competency of a small business to perform a specific government procurement.

A case is referred to SBA if the contracting officer intends to reject an offer submitted by the low bidder or apparent successful offeror because he/she questions the firm's ability to perform the contract. SBA then contacts the concerned company and offers them the opportuntiy to apply to SBA for a certificate of competency (COC). If the COC is granted, the contracting activity must award the contract to the firm.

On August 12, 1982, SBA issued a rule which makes the referral of a case discretionary with the contracting officer for those contracts having a value of under $10,000 in amount. SBA stated that

the reason for the regulation was that the COC program experienced "a dramatic growth in the last four or five years without corresponding increases in resources." Your Committee believes SBA's action violates the Small Business Act.

The Act is clear on its face that there should be no exception to the right of a small business to a COC referral, regardless of the dollar value of the contract. Section 8(b)(7)(A) of the Act states that "a government procurement officer . . . may not, for any reason specified . . . preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for final disposition to SBA."

Moreover, the Comptroller General of the United States ruled in *Matter of Forestry Account* (B–19308, January 30, 1979), that COC referrals to SBA were mandatory regardless of the dollar amount of the contract. By letter dated November 23, 1973, the SBA Associate General Counsel, in fact, concurred with the *Forestry Account* decision by stating:

> We concur with your decision in the *Forestry Account* . . . we know of nothing either in the Small Business Act . . . or legislative history which suggests exempting Government small purchases of less than $10,000 from the SBA or COC Program.

The *Forestry Account* decision was affirmed in *Matter of Z.A.N. Co.* (B–198324, August 6, 1980). In that decision the Comptroller General recommended that the Department of Defense take corrective action to remove a provision contained in the Defense Acquisition Regulation exempting contracts of under $10,000 from the COC program. The DoD subsequently removed the provision.

Your Committee further believes that SBA's argument that limited Program resources require an exception for contracts under $10,000 is substantially without merit. In fiscal year 1981, only 52 or 5.4 percent of a total of 949 COC applications were for contracts of less than $10,000. This averages to only about 5 cases a year per SBA region. Moreover, it must be noted that SBA has never indicated to your Committee that there is a need for additional staffing or resources for the COC program.

Contracts of under $10,000 in amount are extremely important to small business concerns. For example, in fiscal year 1982, the DoD reports that nearly 18 percent of its total awards to small business were represented by contract actions of $10,000 or less.

Further, the COC program has a history of proven success and cost effectiveness. Over the life of the program, 95 percent of firms granted a COC went on to successfully complete the contract. In each case, these firms were either the low bidder or apparent successful offeror. Were it not for the COC, the procurement officer would have either accepted a higher price or cancelled the solicitation in order to reprocure at a later time—an extremely expensive option.

There is a need to legislate, in the clearest possible terms, Congressional intent that access to the COC program not be limited because of the anticipated dollar value of the contract or the nature of the product or service to be procured. The program is successful,

saves the government money, and provides great benefit to small business concerns.

(B) PREQUALIFICATION CRITERIA

In order for a prospective contractor to receive a government contract award, the contracting officer must make an affirmative determination that the offer submitted is responsive to the solicitation and that the contractor is technically and financially responsible to perform the contract. An affirmative determination of responsiveness will be made by the contracting officer if the offer complies in all material respects with the requirements set forth in the solicitation. Thereafter, a prospective contractor must successfully demonstrate his responsibility or capability to perform the contract.

In many instances, a determination of financial and technical ability is supported by a pre-award survey. This procedure involves an evaluation by a contract administration officer of a prospective contractor's capability to perform under the proposed contract. Normally a pre-award survey is required when the information available to the purchasing activity is not sufficient to enable the contracting officer to make a determination regarding the responsibility of the prospective contractor. A contract award is imminent if the contractor is responsive, responsible and, in formally advertised procurements, the lowest bidder. If the contracting officer makes a negative determination of responsibility affecting a small business concern, the case must be referred to SBA for review under certificate of competency procedures.

The Department of Defense has imposed onerous pre-qualification criteria on prospective contractors which, for many types of contracts, must be satisfied in order to submit an offer for consideration. Many times the solicitation requires that an offeror be on a "bidders list" in order to even submit an offer. For example, section 18-209 of the Defense Acquisition Regulations establishes a bidders list for those contractors pre-qualified to perform critical construction projects.

If a contractor who is not on this list, submits an offer, it will be considered non-responsive to the solicitation. Your Committee believes that this practice of screening out potential contractors as non-responsive operates effectively to restrict competition.

A further example of a DoD procedure which limits competition is the Qualified Products List. Section 1-1101 of the Defense Acquisition Regulations states that "it is sometimes necessary to test products in advance of any purchase to determine if a product is available that will meet specification requirements." This section also requires that a business must first be on a "qualified products list" in order to be considered for certain types of government contracts. Purportedly, this process is necessary to insure that the required product meets the necessary quality standards. A small business, however, has no available recorse if its product is denied inclusion on the "qualified products list."

The Department of Defense has submitted in testimony to your Committee that "the selection of an item on which a 'Qualified Products List' is authorized (QPL) is a tightly controlled process

and products must meet rigid criteria to qualify. These criteria restrict the selection to those items which are critical to reliability and to the safety of personnel and equipment and which must be produced to specific design considerations. Extensive testing in an operational mode is often required for qualification."

The types of items on these lists now being purchased by DoD are rather all inclusive. Generally, a qualified products list is established for a number of items, or a family of items, and contains a listing of the suppliers whose products have successfully met the qualification criteria. Although the list may contain some highly critical items, a review of sample lists by your Committee indicates that a number of non-critical items also appear on these lists such as: Household lights, filing cabinets, floor wax, flash lights, safety helmets, saw chains, and spark plugs. Your Committee fails to understand the need for extensive advanced testing for these items.

Moreover, many qualified products lists contain only one prequalified source of supply. Therefore, in these instances, contracts must be awarded on a sole source basis. This requires the government to pay excessively for an item which, if competed, could have been obtained at a much lower price.

Other qualified products lists have been identified that contain absolutely no pre-qualified sources. Your Committee has been informed that when the govenment has a requirement for an item on such a "list," a contract will be awarded with a provision for first article approval. According to section 1-1902(a) of the Defense Acquisition Regulations, first article testing is designed, like the qualified products list, to ensure that the contractor can provide a quality product to the government. As indicated, though, the DoD has used these techniques interchangeably. The only difference, apparently, is that a qualified products list restricts competition while the first article test does not.

Your Committee believes that the failure to be listed on these pre-qualification lists is not determinative of the responsiveness of the contractor. Both the qualified bidders list and the qualified products list relate directly to the quality of the product offered to the government and, therefore, should appropriately be considered as issues related to definitive elements of responsibility.

The qualified products list procedure does little or nothing to ensure that at the time of contract award the product will meet specifications. Just because a contractor can demonstrate that the product once satisfied a test does not mean that in subsequent years it is capable of producing a production run of acceptable, quality items. There is not substitute for valid pre-award analysis to determine capability as of the time of contract award.

Your Committee does not intend to interfere with the quality assurances required by the government before an item may be purchased. There are viable alternatives available to the government to ensure that it will receive a quality product.

Your Committee recommends that the DoD list with specificity in the solicitation the quality control assurances, productive processes and/or equipment required for successful performance of a particular contract. A review of a contractor's capability and competency to provide a quality product may be determined by an extensive pre-award survey or a first article testing procedure. Both

procedures are currently intended to ensure quality and are instrumental in determining a contractor's responsibility at the time performance is required.

Your Committee believes that there is a demonstrated need to eliminate the above cited prequalification barriers to competition. This can effectively increase competition and lower costs, without any reduction in the quality of products furnished to the government.

(C) SUBCONTRACTING REPORTS

Pursuant to section 8(d) of the Small Business Act, the Small Business Administration (SBA) is required to submit an annual report to the Congress on the operations of the small business subcontracting program. The report must detail subcontracting plans found unacceptable by SBA but which were, nonetheless, accepted by contracting agencies. The SBA reviewed a total of 6,414 proposed subcontracting plans during fiscal year 1982. Of these 1,837 were returned to the contracting officers with specific recommendations for improvements. Of the 1,837 plans returned, 380 plans failed to be negotiated for improvement, constituting roughly 6 percent of the total proposed plans. These 380 plans were nonetheless incorporated into contracts and found acceptable by the Federal procuring agency. However, pursuant to SBA determination, these plans did not contain maximum practicable opportunities for small and disadvantaged business concerns to participate in the performance of the prime contracts. The majority of deficiencies found in the aforementioned 380 plans were in the following areas: Inadequate goals for small and small disadvantaged business subcontracting, flow-down subcontracting provisions, and records recital.

The Committee issued an extensive investigation on the subcontracting and 8(a) programs entitled: "Minority Business Development Efforts of the Small Business Administration" (H. Rpt. 97–957, December 10, 1982). Included within that report are detailed recommendations designed to improve the functioning of the subcontracting program. All of these recommendations called for administrative action. Your Committee did not believe, at that time, that legislative action was necessitated—if the recommended changes were implemented by the bureaucracy. However, each of your Committee's recommendations were summarily rejected, without discussion, without consultation, and without offer of any substantive rationale. Yet, statistics strongly indicate that something must be done to increase subcontracting awards to small business. In fact, in fiscal year 1980, 41.2 percent of the subcontract dollar was awarded to small business; by fiscal year 1982 the comparable share fell to 37.6 percent.

It appears that the DoD is most responsible for this decline. In fiscal year 1979, 42.7 percent of its subcontracts were awarded to small business; by fiscal 1982, this percent had fallen to 37.9. In its annual subcontracting report to the Congress (required by section 211 of Public Law 95–507), SBA commented on DoD's poor performance:

> DoD's achievement of 37.9 percent in fiscal year 1982 is the lowest percentage since fiscal year 1976, when 36.9 per-

BEST COPY AVAILABLE

cent was recorded. This coupled with the fact that the DoD's dollar base was actually $4.4 billion more than projected—and DoD still had a $523 million shortfall (i.e. against its goal)—may presage, for whatever reasons a diminishing emphasis on subcontracting to small business.

This "diminishing emphasis" is also evidenced in other ways. In the fiscal year 1982 subcontracting report referred to above, SBA identified 15 contracts/modifications over the statutory threshold which did not contain either subcontracting plans or documentation in the file why the plan was omitted. All 15 cases involved contract actions of the DoD.

There exist a need for your Committee to receive additional materials in SBA annual reports so that it may identify, with greater facility, potential repetitive problem areas. This will allow for more effective oversight and, hopefully, result in improved program operations.

(D) SET-ASIDES

In order to effectuate the purposes of the Small Business Act, Congress has authorized the use of a set-aside procurement method for any contract (or part of a contract) whenever it is determined: "(1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns. . .".

Two of the three justifications for the use of small business set-asides for the purchase of goods and services relate to benefits that accrue to the government and not to the small business community. Your Committee does not cite this fact as an indication of which "purpose" enjoys the most favor in the statutory scheme, but, rather, as a reminder that the government, itself, is a direct beneficiary of a strong and effective set-aside program.

There is no doubt that set asides are needed to insure the realization of these statutory purposes. Statistics obtained from the Department of Defense demonstrate that small business has grown increasingly reliant on set-asides in its attempt to maintain a share of the purchase budget. In fact, in fiscal year 1982, 49.8 percent of all DoD contracts to small business were awarded through the set-aside program. In fiscal 1977—just five years previous—the comparable percent was 30.3 percent.

TABLE I—DOD SMALL BUSINESS SET-ASIDES AS A PERCENT OF TOTAL AWARDS TO SMALL BUSINESS[1]

[Dollars in millions]

	Fiscal year—					
	1977	1978	1979	1980	1981	1982
Total awards	$47,114	$54,359	$58,544	$66,704	$87,195	$102,463
Awards to small business	9,535	10,735	12,170	13,588	17,770	20,143
Set-aside awards	2,890	3,434	4,105	4,787	8,322	10,041
Set-asides as a percent of awards to small business	30.3	31.9	33.7	35.2	46.8	49.8

[1] Source: Department of Defense, "Prime Contract Awards," first half fiscal year 1983, the Pentagon, Washington, D.C.

Since there is a demonstated need to maintain the set-aside program, it is incumbent upon the Congress to insure that this program is administered in a consistent and effective manner. Unfortunately, your Committee has not found this to be the case.

The Federal Procurement Regulations (FPR) govern the purchase of good and services by civilian agencies. The FPR does not authorize use of small business setasides unless there is a "reasonable expectation that bids or proposals will be obtained from a *sufficient number* of responsible concerns, organizations, and individuals so that awards will be made at reasonable prices." 41 CFR Sec. 1-1.706–5(a) (emphasis supplied). Nowhere is the term "sufficient number" defined, thereby allowing varying interpretations with each civilian agency and each procurement officer *within* each civilian agency.

Military services, on the other hand, are governed by the Defense Acquisition Regulations, (DAR). The DAR provides, at 1-706.5(a)(1):

> The entire amount of an idividual acquisition or class of acquisition . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices.

Your Committee is of the opinion that the DAR approach is far more reasoned because it has a proven record of both administrative consistency and program effectiveness. This "test of two" has been a part of the DAR since 1979, yet, the General Services Administration (GSA), the agency authorized by law to promulgate the FPR, has failed to conform its civilian regulations.

This inconsistency needs resolution. Congress should not permit a situation where the same contract requirement would be considered appropriate for a setaside if purchased by a defense agency, but inappropriate if purchased by a civilian agency merely because its procurement officers are free to determine what is a "sufficient number."

There is some moverment to resolve this inconsistency through regulations. The Office of Federal Procurement Policy (OFPP) published the Federal Acquisition Regulations (FAR) in the Federal

Register on September 19, 1983. The FAR, together with agency supplemental regulation, is intended to replace both the FPR and the DAR. The effective date of the FAR is April 1, 1984.

A late draft of the proposed FAR (circulated in the Spring of 1982) adopted the FPR language of "sufficient number". It was only after vigorous protests by your Committee that the final version of the FAR was changed to the DAR "test of two."

While successful in this effort, your Committee does not believe that a test for the use of the set-aside program should remain a matter of administrative interpretation. The program, as indicated above, is vital to the maintenance of small business as a participant in the federal purchase system and, as present law states, such participation is vital to the maintenance of competition and the Nation's productive capacity. The test for such an important program should, by right, rest with the Congress and not with the varying interpretations of the bureaucracy.

Your Committee, of course, realizes that no matter what small business test is legislated there remains a need for some mechanism to resolve set-aside disputes between the Small Business Administration and the buying agency. Under present law, such disputes are finally resolved by the secretary or head of the buying agency. However each agency with procurment powers is required by section 15(k) of the Small Business Act to have a Director of Small and Disadvantaged Business Utilization. According to the statute, the Director is to "be responsible for the implementation and execution of the functions and duties under sections 8 and 15 of this Act which relate to such agency . . ." Section 15, of course, establishes the small business set-aside authority. Section 15(k) may, therefore, create an inconsistency between the responsibilities of the Director and his/her authority to meet those responsibilities since the decision for resolving set-aside disputes does not rest with the Director.

Moreover, despite the elevated position Congress intended for the Director, some agencies do not provide this individal with any appropriate input into appeal procedures or policymaking. In fact, the General Counsel of the Air Force has ruled that its Director's role in only "advisory." Such an interpretation is in clear conflict with the statute which intended, for example, that the Director could direct the set-aside of any contract pursuant to sections 8 and 15 of the Act.

The Secretary of the Army, in contrast has afforded his Director the appropriate authority to perform her job effectively. In fact, the Secretary has issued a General Order delegating his authority to make final set-aside appeal determinations to his Director. Because of this decisive action, there should exist no ambiguity in the Army regarding the duties and authorities of its Director.

As these two examples demonstrate, there exists a need to clarify the appeal mechanism for set-asides and to resolve any possible confusion by reconciling these provisions with section 15(k) of the Act.

(E) A-76 AND CONSOLIDATED CONTRACTING

On August 4, 1983 the Office of Management and Budget (OMB) issued its final revision to Circular A-76. This revised circular es-

tablishes the policies and procedures used to determine whether commercial activities should be performed in-house with government personnel or contracted out to private concerns.

Circular A–76 requires agencies to inventory their commercial activities and establish schedules for their periodic review. When appropriate, cost comparisons must be conducted to determine whether government personnel or private industry can perform the requirement more economically. A decision to "convert" a requirement to contract is required if the private sector cost is at least 10 percent less than the in-house cost estimate.

The revised version of Circular A–76 as initially proposed, encouraged consolidation of commercial functions that are related by nature or work location. Your Committee has found that these large "umbrella" contracts prevent small and minority businesses from obtaining prime contracts awards since only large companies with the financial capability and resources to manage multi-million dollar awards can compete effectively for these contracts. Language contained in the original version of Circular A–76 acknowledged that this policy would, in fact, have the effect of reducing prime contract opportunities for small and small disadvantaged businesses. To compensate for this drastic loss of prime contracts OMB proposed that large prime contractors be mandated to subcontract a predetermined percent of the work to small and small disadvantaged concerns regardless of whether or not the prime could have performed the work at a lower price. Your Committee declared that this policy conflicted with Public Law 95–507 which requires that small and small disadvantaged business subcontracting goals be negotiated on a case-by-case basis to provide maximum participation for such concerns "consistent with the efficient performance" of the contract. Furthermore, the promise to subcontract is not just compensation for denying prime contract opportunities to the small and small disadvantaged business community.

As a result of the concerns raised by your Committee, OMB agreed to re-draft the language so as not to preclude participation by small and small disadvantaged business in the performance of prime contracts. The new language does not make any reference to "consolidation" or "umbrella" concepts. Instead, it provides that when packaging requirements for cost analysis the agency shall give equal consideration to maximizing economies and providing the maximum practicable opportunity for the participation of small and small disadvantaged business in the performance of prime and subcontract awards.

The OMB policy, as re-drafted, is consistent with a memorandum, dated June 1, 1982, circulated to military departments by former Deputy Secretary of Defense, Frank Carlucci. This memorandum concisely states that functions currently being formed by small and minority business shall not be considered for consolidation, and that future solicitations be packaged so as not to preclude performance of prime contracts by small and small disadvantaged concerns.

By memorandum dated June 29, 1983, Paul Thayer, who succeeded Frank Carlucci as Deputy Secretary of Defense, issued new guidance to all military departments regarding "Consolidations and Small Business." This new guidance, however, is extremely vague

and makes presumptions concerning the perceived benefits of consolidations which are totally unsupported by fact. Moreover, there are other provisions of the memorandum, pertaining to subcontracting plans, which direct actions that are inconsistent with and, indeed, violative of Public Law 95-507. This new memorandum allows the potential for the continuation of capricious consolidation decisions that will harm not not only small business, but also the integrity of the entire A-76 process.

Traditionally, small businesses have been active in the performance of commercial items as prime contractors. Recent procurement data received by your Committee from the Department of Defense indicate that during the first nine months of fiscal year 1983, small business concerns received approximately 43 percent of the total prime contract award for commercial items. Although this percentage may appear to be substantial, DoD is consolidating more commercial requirements into large umbrella contracts effectively precluding small business from competing. This will result in a rapid decrease in prime contract awards to small businesses; the trend is already evident. In fiscal year 1982, over 45 percent of the awards for commercial items were captured by small concerns, a decrease of 2 percent in just one year.

Your Committee has been alerted to a number of consolidations that have resulted in the displacement of small and small disadvantaged business firms as prime contractors. For instance, at the Department of the Army, a number of base support services at Fort Monmouth, N.J. were consolidated into one umbrella contract ultimately replacing eight small and small disadvantaged business concerns with one large contractor.[1] This effort was purportedly justified by DoD as being the most economical alternative for the government. However, contrary to this belief, numerous change orders and calls for upward adjustment of price were issued throughout the term of the contract due to inaccurate scope of work estimates by DoD.

Another consolidation occured at the Naval Weapons Center located in China Lake, Calif. where the Department of Navy consolidated a number of requirements into a large contract which resulted in the displacement of 12 small business concerns. In both instances the consolidated contract was so large that it was not susceptible to performance by small business concerns as prime contractors.

Recently GAO examined two contracts consolidated by DoD. One involved a contract awarded by the Army's 7th signal command at Fort Ritchie, Md. for the operation and maintenance of telephone systems in the Southeastern United States. The other involved a procurement at Fort Monmouth, N.J. for the upgrading of post and base telephone systems for 44 Army bases in the United States and eight bases in Korea. ("How Selected DoD Consolidation Efforts Affected Small Business Opportunities," GAO/NSIAD-83-30, August 12, 1983.)

In both cases DoD justified the use of this procurement method upon the principle that consolidation afforded substantial cost savings to the government. The purpose of the GAO investigation was

[1] The large contractor did, however, utilize some of these small firms as subcontractors.

to determine if consolidation was in fact the most economical procurement practice and if such a practice adversely affected the ability of small businesses to compete.

GAO concluded that consolidations have the potential for limiting prime contract awards to small businesses and may not always result in the lowest cost to the government because the decision to consolidate is not always based upon an adequate cost analysis. It further concluded that procurement activities rely too heavily upon subcontracting opportunities for small businesses as compensation for the loss of prime contract awards. Your Committee agrees with these findings.

Evidence received by your Committee over the past several years indicates that the practice of consolidating a number of requirements into umbrella contracts is not only inhibiting small and small disadvantaged businesses from full participation in the mainstream of the Federal procurement system but is also having a deleterious effect on other objectives of the acquisition process. When many different requirements are combined into one large umbrella contract the risk of non-performance is no longer spread over a number of different contractors. Moreover, to rely for vital services on a handful of contractors effectively reduces the mobilization base and destroys competition. This, in turn, may eventually subject the government to the adverse consequences of monopolistic or oligopolistic market conditions in the future.

For all of the above cited reasons, it is the belief of your Committee that there is a demonstrated need for the Congress to preserve competition in the commercial items area by protecting the ability of small business to compete, as prime contractors, for such awards.

(F) SPARE AND REPLACEMENT PARTS

In recent years the Nation's defense and related activities accounted for a staggering 80 percent of the Federal Government's contract dollar, an amount approximating $125 billion in fiscal year 1982 alone. Testimony given before your Committee indicates that a contributing factor to the high cost of defense relates directly to lack of competition. In fiscal year 1982, non-competitive procurement methods accounted for 47.4 percent of the entire DoD purchase dollar. Formally advertised, sealed bid procedures, accounted for a meager 6.7 percent of total purchases.

A substantial portion of the defense budget relates to the acquisition of major weapons systems. Prime contractors serve primarily as assemblers of thousands of components sometimes producing as little as 20 percent or less in-house. Once a major weapons system goes into production, the government finds itself in the position of acquiring spare or replacement parts on a grand scale. Spare parts amount to a $13 billion-a-year business, most of which are purchased on a sole source basis.

Recent reports in the press have revealed incidents involving outrageous over-charges including an ordinary claw hammer for $435, a plastic cap that cost the military $1,118, and an electronic diode worth 4¢ for which the Air Force paid $104. According to information made available to the Senate Armed Services Commit-

tee, less than $3 billion in spare parts was awarded by competitive procurement methods. A recent GAO report, however, found that when spare parts were "broken out" for competitive procurement, the overall costs could be reduced by as much as 30 to 40 percent.

Testimony before the Subcommittee on General Oversight and the Economy illustrates the potential for enormous increases in the cost of spare parts procured from the original manufacturer on a sole source basis. A turbine ring produced for a military jet engine cost $3,256 in 1972. In 1982 the unit cost was $16,811 under a basic ordering agreement with the large business prime contractor. Even with the addition of a 131-percent inflation rate for that period, the cost should have been only $10,156. After this part was "broken out" for competition, the contract was won by a small business which agreed to manufacturer the ring for $6,310 each—a savings of $10,501 per unit. Taking into account the total contract volume, this one break out saved the government $1.5 million in just one year.

Other examples brought before the Oversight Subcommittee included a non-critical aircraft part, a simple bracket for holding cable, that cost the government $850, but which could actually be produced for $25; a baffle which was originally sold to the government for $3,577 was purchased for $1,127 after it was competed; and a seal which cost $2,000 before break-out was subsequently procured for $476 after break-out.

The management of several million items is in itself no easy matter. Items are assigned a 13 digit stock number so that the buyer often does not know the physical characteristic or configuration of the part being purchased. A procurement method code (PMC) determines how a part may be repurchased, that is, through the use of either a competitive or restricted source method. Neither the buyer nor the item manager has authority to question or change the PMC. According to a draft report by a Defense Department Inspector General, thousands of spare parts are unnecessarily coded for sole source procurement.

Testimony received from private and public sector witnesses alike demonstrated that small business is capable of producing quality spare parts, on time, and far cheaper than its large business counterparts. Small firms are cost-efficient because they are flexible, have less overhead, and are more innovative. Increased numbers of small businesses in spare parts procurement will develop new resources, increase capacity for defense mobilization, enhance innovative solutions to military needs, and make better use of our defense dollar.

Your Committee recognizes that there are some legitimate reasons for non-competitive or sole source awards. The desirability of cost savings made possible by spare parts break-outs must be balanced by legitimate government objectives such as exigent time constraints, national security, and the protection of legitimate proprietary rights. Agency procurement officials require sufficient flexibility and authority to make sole source awards when necessary to achieve these objectives. But, because sole source methods severely restrict the benefits available through competition and are subject to extreme abuses, the reasons given to justify sole source methods must be clearly defined and subject to close scrutiny. Un-

fortunately, nowhere in present law are there recited the exact reasons justifying such awards nor the level of administrative review required for these types of contracts.

Proprietary rights

Testimony received by your Committee indicated that one of the most serious obstacles to spare parts break-outs is the issue of proprietary rights. These rights include patents, trademarks, copyrights, trade secrets, and rights in data. As applicable to spare parts purchases, the term "proprietary rights" may arise in relation to specifications, blueprints, descriptions of productive processes, or other recorded information originating with the contractor and claimed by the contractor to be privileged and exempt from disclosure.

Patents are limited monopolies and, perhaps, are more important to small businesses than to big businesses which enjoy wide-scale marketing advantages that minimize the impact of infringements. The patent system, however, has several disadvantages. It involves time and effort, and patent litigation, often necessary to protect a patent from challenge or infringement, is lengthy, risky, and extremely costly. An idea, no matter how original, is unpatentable, as is an innovative device or process which fails to meet the "obviousness" test, an elusive doctrine. In addition, the full disclosure required in order to apply for a patent may jeopardize commerical potential should the patent be denied or successfully challenged by an infringer.

Your Committee was informed that for all of these reasons businesses often elect not to take this commercial risk. More and more companies, large and small, are choosing the "trade secret route" to protect commercially valuable data. That is, instead of attempting to obtain a patent the property will be kept secret and protected by contract clauses when the originating firm permits its use by others. As technologies advance with increasing rapidity, the protection of trade secrets contained in technical data becomes more and more critical to maintain commercial viability.

Development of a major weapons system normally occurs over a span of several years under a series of contracts ranging from research and development (R&D), through full-scale engineering development (FSED), and, when a prototype exists, to a production contract. Mountains of technical data are produced during the course of systems development. Who owns the rights to the data is determined by a number of factors including the source of funds used in the development, but identifying the source is often a complicated matter. When did the idea originate? Where? By whom? Did a government contract exist at the time? How was the research conducted, and with whose facilities? In many cases there is a commingling of funds, facilities, and efforts. In such situations, rights to technical data must be balanced in such a way as to satisfy the government's legitimate interests and to protect the commerical position of participating business firms.

When the government paid for their development, it may take unlimited rights in the technical data which would allow it to disclose such data to others for manufacture and future procurement. Many parts are developed at private expense and modified for mili-

tary use. If a component is derivative, the government may acquire rights to data pertaining only to the government modification. In other cases, when private funds were used, the government has a variety of options available. Under such circumstances it may acquire "limited rights" which call for delivery of data for use or disclosure *by* and *for* the government. Under other circumstances it may be appropriate for the government to acquire "licensing rights" which allow disclosure of technical data for manufacture or production by an alternate source for governmental purposes but not for commercial purposes.

Proprietary rights should not be permitted to unfairly or unreasonably restrict competition. One problem arises when suppliers routinely designate as proprietary most of the technical data produced during the development of major systems. Data designated as proprietary may not be disclosed outside the government without permission of the contractor. While challenges to proprietary designations are provided for in regulations, they are time consuming. It is far easier for a government buyer to order parts from the original equipment manufacturer and avoid any possible "difficulty" in justifying a competitive solicitation, regardless of how significant the potential cost savings. The indiscriminate use of proprietary rights designations impedes the break out process and is used to justify and perpetuate sole source procurements of replacement parts. Strong remedial measures need to be taken against any business which falsely claims data as proprietary.

Clarification and further guidance are needed to define legitimate proprietary rights. Rules and regulations should be established for the use and disclosure of technical information in such a manner as to facilitate break outs without causing substantial harm to the competitive position of a government contractor, or impairing the ability of the government to obtain necessary information in the future.

Small business concerns should be consulted before any such rules are issued in order to identify their needs and explore the impact of options being considered. The House and Senate Committees on Small Business should maintain vigorous oversight of this process and how its statements of policies and objectives favoring increased competition, innovation, and participation of small business in Federal purchases are being considered and implemented.

Mandatory clauses are needed in initial production contracts for major systems to address the rights of the government to data developed in whole or in part with Federal funds. In order to clearly establish the relative positions of the government and the contractor, such clauses are necessary to specify appropriately the right of the government to own, license, or use such data for future procurement purposes and the extent of any proprietary rights retained by the contractor.

Manufacturing and engineering groups have also indicated that despite the confidential nature of detailed specifications, they are ready, willing, and able to provide replacement parts if given the opportunity to study an item to discover its properties and/or configuration. It is probable that thousands of spare and replacement parts could be replicated by small manufacturers without compromising quality if they were given access to the item itself. Since the

disclosure prohibition applies only to the data and not to the finished product, the government is free to obtain competition for future acquisitions through "reverse engineering" or by publishing a description of the item or component which does not illegally disclose proprietary data. A program whereby small business concerns would be able to borrow or purchase a part for duplication could well serve the interests of industry and government.

(G) LABOR SURPLUS AREA PROCUREMENTS

Labor surplus area (LSA) procurements are intended to bolster the defense posture of the United States through the effective utilization of all factors of production, including our human resources. The purpose of Defense Manpower Policy 4B is stated, in part, thusly:

> Success of the national defense program depends upon efficient use of all of our resources, including the labor force and production facilities, which are preserved through utilizing the skills of both management and labor. A primary aim of Federal manpower policy is to encourage full utilization of existing production facilities and workers in preference to creating new plants or moving workers, thus assisting in the maintenance of economic balance and employment stability. (44 CFR sec. 331.1).

Both the Executive and Legislative Branches have formulated specific policies designed to implement these vital purposes. For example, the following policies are contained in administrative regulations and may be found at 44 CFR sec. 331.2:

> (a) It is the policy of the Federal Government to award appropriate contracts to eligible labor surplus area concerns, to place production facilities in labor surplus areas, and to make the best use of our natural, industrial and labor resources in order to achieve the following objectives:
>
> (1) To preserve management and employee skills necessary to fulfillment of Government contracts and purchases;
>
> (2) To maintain productive facilities;
>
> (3) To improve utilization of the Nation's total economic potential by making use of the labor force resources of each area; and
>
> (4) To help ensure timely delivery of required goods and services and to promote readiness for mobilization by locating procurement where the needed labor force and facilities are fully available.

Section 331.3 of the same Title 44, provides that: "The provisions of this policy apply to all Federal departments and agencies, except as otherwise prohibited by law."

The Small Business Act specifically refers to this statement of policy and provides additional authorities to facilitate its execution. Section 15(d) of the Act (as amended by Public Law 95–89, approved August 4, 1977) provides, in relevant part, "Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A CFR Chapter 1) or

any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices."

Data supplied your Committee from the Federal Procurement Data Center demonstrates that of the $475 billion of Federal procurements between fiscal years 1979 through the second quarter of 1983, about $4.8 billion, or 1 percent, was awarded as a result of the labor surplus area procurement program. However, only $1.8 billion of these LSA awards, or about 37 percent, were let by the DoD even though DoD accounted for about 80 percent of the entire Federal purchase dollar during this period.

Despite the fact that the Small Business Act only "authorizes" LSA set-aside awards in the discretion of the Secretary and without attempting to specify the types of products to be purchased under this procurement method, the DoD has and continues to object to the program. In fact, in 1981, at the urging of the DoD, Congress passed a prohibition against DoD paying "a price differential for the purpose of relieving economic dislocations." (10 U.S.C. sec. 2392(b).) As interpreted, this prohibition effectively disallows DoD from participating in the LSA set-aside program.

It is ironic to note that DoD advocates its exemption from a Defense Manpower Policy, which all civilian agencies are legally required to follow. It is, however, extremely disturbing to note the concentration of the DoD dollar in certain "industrial pockets" located within a handful of States. In fact, for fiscal year 1982, the DoD reports that approximately 47 percent of its prime contract dollar was awarded to firms located in only five (5) States. Indeed, it appears that the purposes of DMP-4B have yet to be realized. Your Committee, therefore, fails to understand DoD's continued reluctance to receive a grant of authority from the Congress which would further the Department's ability to comply with a Defense Manpower Policy.

There exists a need to impose uniformity and consistency on the Federal acquisition system by insuring that all agencies—both civilian and military—have the same discretionary authorities to effectuate the policies contained in DMP-4B. The government needs to have the LSA procurement authorities available, when needed, and exempting nearly 80 percent of all acquisitions from the program appears both illogical and shortsighted.

(H) GOALS

Present law requires that the head of each Federal agency shall establish yearly procurement goals for small and small disadvantaged business utilization. These goals, which pertain to prime contracts in excess of $10,000 and subcontract awards, are to be formulated jointly with the Small Business Administration (SBA). Disputes, if any, between the SBA and the buying activity are to be resolved by the Administrator of the Office of Federal Procurement Policy.

Your Committee has found, however, that goals are not always set in a timely manner. For example, the Department of Defense did not set its fiscal year 1983 goals until nearly nine months into

the fiscal year. In fact, this dereliction appears to be continuing. The Department has yet to establish goals for this fiscal year.

The lack of timely goal setting is extremely disruptive to the proper management of the small and small disadvantaged business programs. The perception conveyed to procurement personnel in the field is that these programs are of subordinate interests to higher authorities within their respective agencies. Program planning is also rendered a practical impossibility. How can any manager plan for a certain level of activity needed to meet yearly goals when those goals are not disseminated until seventy-five (75) percent of the fiscal year has expired?

Another problem with the existing goal setting process is that present law only requires the goaling of prime contracts that exceed $10,000 in amount. However, a large share of contract awards made to small business are in that lower range. For example, the Department of Defense reports that of the $20 billion in total awarded to small business during fiscal year 1982, $3.6 billion, or nearly 18 percent, were represented by contract actions of $10,000 or less. Effective goal setting should take into account such a large share of total awards and afford buying agencies appropriate credit for their efforts in that area.

Finally, your Committee notes the need to make the legislated goal setting process consistent with other provisions of law. Section 15(d) of the Small Business Act establishes priorities for the award of set-aside contracts. The highest priority afforded any category is labor surplus area awards. Yet, the goal setting procedure does not goal nor otherwise take into account this class of awards. Such an inconsistency, your Committee believes, warrants correction.

(I) CONTRACT PRESUMPTIONS

Under existing law, each contract for the award of goods and services having an anticipated value of less than $10,000, and which is "subject to" small purchase procedures, is to be reserved exclusively for small business competition unless the contracting officer cannot obtain offers from two or more small business concerns that are competitive with market prices, quality, and delivery.

By enacting this law in 1978, Congress created, in effect, a presumption in favor of small business concerns for contracts of under $10,000 in amount. The law's requirement, that such contract "shall be reserved exclusively" for small business "unless" two or more responsible and responsive offers are not able to be received, clearly supports this position.

The intended effect of this change is being realized. According to data supplied your Committee by the Department of Defense, in fiscal year 1977, small business received 48.5 percent of all contract actions of $10,000 or less by fiscal year 1982, the comparable percent increased to 53.6.

TABLE 2.—PERCENT OF DOLLARS AWARDED SMALL BUSINESS, DOD CONTRACT ACTIONS OF UNDER $10,000 [1]

	Fiscal year—					
	1977	1978	1979	1980	1981	1982
Percent to small business	48.5	48.6	49.4	51.1	53.5	53.6

[1] Source: Department of Defense, Prime Contract Awards, first half fiscal year 1983, the Pentagon, Washington, D.C.

Your Committee believes that the $10,000 limit established in 1978 needs to be adjusted upward. Not only would inflationary considerations along justify this increase, but other date pertaining to the use of reserves also establish that this procedure does result in competitive prices to the government while increasing the share of awards to small business.

Testimony received by your Committee from the SBA's Chief Counsel for Advocacy also supports this premise. In fact, on the basis of an analysis conducted by the Office of Advocacy, it is estimated that had the reserve amount been $25,000 in fiscal year 1982 an additional $2 billion in contracts would have been awarded to small business concerns in that year.

Small business set-asides are different from small business reserves. A reserve, under existing law, could only be used for an award having an anticipated value of under $10,000 and which is subject to small purchase precedures. Small business set-asides can be legally of any value. However, the major distinction between these two methods is SBA's administration ruling that a small business set-aside offeror must supply the product of a domestic small business concern, while a small business "reserve" offeror may supply the product of any domestic business, regardless of size. The practical effect of this distinction is that reserves more readily benefit the small business dealer, wholesaler, and supplier while the set-aside primarily benefits the small business manufacturer.

While your Committee believes such a distinction to be a necessary accommodation to the realities of the business world, we do note that the reserve language now in the statute contains criteria for the use of that procurement method and a corresponding presumption that the criteria will be met for most awards of under $10,000 in amount. This bill would, for the first time, legislate criteria for the use of the set-aside program and, accordingly, raises the issue of whether Congress needs to legislate its presumption of when those set-aside criteria are likely to be met. Your Committee believes that such a need exists.

In view of the steadily decreasing share of the federal purchase dollar being captured by small business, it is wholly appropriate for the Congress to take strong measures necessary to reverse this trend. In fiscal year 1979, 20.8 percent of the DoD prime contract dollar was awarded to small business concerns. By fiscal year 1982, that share had decreased to 19.7 percent, and for the first eleven months of fiscal year 1983 had fallen to 17.4 percent. Data are not yet available for the last month of fiscal year 1983, however, the rate evidenced through the first eleven months does constitute a record low. A legislative presumption in favor of small busines set-asides for a defined class of contracts will help to reverse this nega-

tive trend much the same as small business reserves have increased the award of low dollar value contracts to small concerns.

Congress is capable of describing those contract situations which its expects will most likely meet its own set-aside criteria. Be defining those situations in statute, Congress will be providing administrative guidance to procurement personnel without any fear of engaging in micro-management.

The use of a presumptive set-aside is not unprecedented. In fact, the Defense Acquisition Regulations (DAR) presently have a presumption of set-aside for every construction contract having a value of under $2 million and for every dredging contract having a value of under $1 million (1-706.5(a)(2) and (3)). The DAR, however, does not merely stop at construction and dredging. In fact, whenever any product or service has been successfully purchases under the set-aside procedure, the contracting officer is to presume that a set-aside remains appropriate (now denominated a "repetitive set-aside") *unless* he/she believes that two or more responsible small businesses will not submit offers at reasonable prices. However, this rebuttal to the presumption of a repetitive set-aside can only be accompanied by the contracting officer giving written notice to both the activity's small business specialist and the SBA respresentative. The written notice must contain the contracting officer's reason for the withdrawal and, upon review, SBA could appeal the decision to the head of the procuring agency for a final decision. (See 1-706.1(f) and 1-706.3.)

Your committee is of the belief that Congress needs to input this area of presumptions, especially in view of the fact that it now proposes to legislate criteria for the award of set-asides.

(J) MISREPRESENTATION OF SMALL BUSINESS STATUS

Section 3(a) of the Small Business Act defines a small business concern as one which is independently owned and operated and not dominant in its field of operation. SBA is authorized to issue regulations which establish detailed standards to determine which concerns are small within the meaning of the Act and, therefore, eligible to participate in its varied programs.

Before the government may consider an offer submitted by a contractor to receive a small business set-aside award, the contractor must self certify its status as a small business concern. This is done by checking an appropriate box on the procurement form. Absent the initiation of a size protest by another party or knowledge to the contrary, the contracting officer must accept the offeror's representation that it is, in fact, a small business concern.

Recently, your Committee has been informed of an increasing number of instances when a business has self-certified its size status as small, received a set-aside award, but was determined subsequently to be "other than small". Notwithstanding such a determination, if the protest was not filed in a timely manner, the "other than small" offeror will be allowed to perform the pending contract, but disallowed from self-certifying as small on future set-asides. According to SBA regulations, 13 C.F.R. 121.3-5(a), a protest must be received by the procuring activity within five business days in order to apply to a pending procurement. Such a short

period of time is often inadequate for an adversely affected small business offeror to gather the information needed to file a protest. Consequently, the fear of a timely protest is not an adequate disincentive for an "other than small" concern to misrepresent its status on a particular procurement.

Under current law, anyone who falsely represents their status as a small business concern may be subject to prosecution under the U.S. Criminal Code, Title 18 U.S.C. 1001. This section is applicable to the making of false statements or misrepresentations to any Federal agency, and imposes a penalty of five years imprisonment or a $10,000 fine or both. However, prosecutions under this section for the misrepresentation of a firm's size in order to obtain a set aside are extremely rare.

The Small Business Act, however, specifically makes it a crime for anyone to knowingly make a false statement for the purpose of obtaining a loan from the SBA. This section imposes a fine of up to $5,000 or two years imprisonment or both. A similar provision is not contained in the Small Business Act pertaining to false statements made for the purpose of obtaining a contract. The government may only prosecute these actions under 18 U.S.C. 1001. There is, accordingly, no consistency between the treatment of loan and procurement programs. Moreover, misrepresentations made to obtain subcontracts from prime contractors are not generally considered "actionable" at all under 18 U.S.C. 1001 because there is no misrepresentation made by the subcontractor directly to the government.

As is evident, there exists a need to provide a meaningful disincentive to those who would misrepresent their status as a small business concern. Further, in order to be consistent, the Small Business Act should treat with equal severity misrepresentations made with respect to both loans and procurements. Finally, in order to protect the integrity of the subcontracting program, Congress needs to impose sanctions for misrepresentations regardless of whether or not they are technically made to the government.

What the Bill Would Do

(A) THE CERTIFICATE OF COMPETENCY PROGRAM

The bill would provide that SBA cannot refuse to accept and consider a CoC referral made by a contracting officer pursuant to section 8(b)(7)(A), which pertains to all responsibility issues, and 8(b)(7)(B), which pertains to the "manufacturer or regular dealer" requirements of the Walsh-Healey Act. Further, SBA is precluded from making any referral discretionary with the contracting officer on any basis including, but not limited to, the dollar size of the contract, or the nature of the work to be performed. Nothing in the bill, however, would require SBA to process a CoC application if the small business, to whom the referral pertains, declines to have its application processed.

It is the intent of your Committee that a small business have unimpeded access to CoC procedures whenever it is proposed to deny it a contract—of any size, for any product or service—solely on the

basis of responsibility issues or issues arising under the "manufacturer or regular dealer" rule.

(B) PREQUALIFICATION CRITERIA

The bill would provide that no small business concern may be denied the opportunity to submit and have considered its offer for any federal contract solely because such concern is not on a qualified bidders list, does not have its products on a qualified products list or has not received prior approval from an agency relating to a certain nature of work or class of contracts, if that approval pertains to responsibility issues.

The bill would not, under any circumstances, require an agency to award a contract to other than a responsible firm, nor to reduce its quality standards for any acquisition. In addition, these provisions would not preclude a sole-source award, if otherwise authorized by law.

For those acquisitions which require items capable of meeting minimum military performance standards, it is recommended that the solicitation contain or reference those standards and, when appropriate, specify the types of productive processes, or quality control mechanisms needed to insure the production of a product of acceptable performance/design characteristics. If pre-testing is required, sufficient lead time, when appropriate, should be included within the procurement cycle. In the alternative, first article testing or other quality assurance techniques may also be used.

All of these standards should be considered definitive elements of responsibility; the failure of the low bidder to meet any would, therefore, result in a non-responsibility determination for that particular contract. Such a determination could be made legitimately if, for example, certified testing data called for in the solicitation could not be provided the government within the time frame specified. Since all of these issues relate to "quality" they should not be considered "responsiveness" issues within the meaning of relevant procurement regulations.

Your Committee believes that prequalification is costly and anti-competitive. The government should be attempting to secure the widest range of offerors possible and not restrict competition to a select group of favored contractors.

(C) SUBCONTRACTING REPORTS

The bill would specify the types of information SBA must include in its annual subcontracting report to the Congress. Specifically, that information is to include, for each noted contract: (1) the relevant contract number; (2) the name of the Federal buying activity; (3) the name of the contractor; and (4) the name of the Federal procurement contracting officer who accepted the plan. At present, SBA routinely supplies all of this information in its annual report, with the exception of the name of the contracting officer.

Your Committee believes that since the name of the contracting officer on a particular contract is already a matter of public record, there should be no hesitancy to supply that information to the Congress along with other data concerning the particular award. Not only will the automatic provision of that information facilitate

your Committee's review of such reports, but it will also provide agency Directors of Small and Disadvantaged Business Utilization an increased ability to identify potential repetitive problem areas.

(D) SET-ASIDES

The bill would address the need for uniformity and consistency in program administration by legislating criteria for the use of the set-aside program that are applicable to all agencies of the government.

Generally, the bill would codify the DAR provisions requiring a favorable set-aside decision when the contracting officer has a reasonable expectation that offers will be obtained from two or more responsible small business concerns and that awards will be made at reasonable prices. However, your Committee has added a third criterion. The bill requires that the contracting officer also determine that the delivery of the goods or services be rendered within the time needs of the agency. It is believed that this third condition is required to avoid any potential problem with statutory construction. It is not your Committee's intent that set-aside procedures be used when exigent needs demand an expedited purchase.

The bill would, in addition, reconcile the authorities of the Director of Small and Disadvantaged Business Utilization and the Secretary or head of an agency. The bill provides that the Director have the final authority to decide all appeals filed by the Small Business Administration. This new grant of authority is totally consistent with other authorities already given the Director by section 15(k) of the Small Business Act and is expected to provide much needed uniformity throughout all agencies.

(E) A-76 AND CONSOLIDATED CONTRACTING

The bill would require Federal agencies, "when feasible," to reduce the number of requirements contained in their contract solicitations in order to increase the opportunity for small and small disadvantaged business to compete for prime contracts. This requirement is consistent with the policy objectives contained in the Revised Circular A-76 and Public Law 95-507. Your Committee believes that such reductions would not be "feasible" in only two types of situations: (1) when the nature of certain commercial activities require that they be performed in a set order (i.e. in sequence, or in tandem) because the satisfactory completion of a particular activity is dependent upon the satisfactory completion of one or more other activities and it is unreasonable to assume that multiple contractors can coordinate properly the performance of their respective functions; or (2) when overriding national security considerations require a specific grouping of commercial activities for cost analysis and/or compel the use of restricted procurement methods. The bill would also give the SBA appeal rights to challenge any grouping of functions which it may believe violates these provisions.

Your Committee does not intend to interfere with the decision-making process to determine whether or not a commercial activity should be converted to contract. SBA is given absolutely no rights in this area. However, the bill would create a presumption that

those commercial activities which are converted to contract be set-aside either for small business or for award under the 8(a) program. This presumption may be rebutted if it is determined that the government will be unable to obtain offers from two or more responsible small firms or that award is not suitable under section 8(a). If the particular contract has a value of over $2 million, the contracting officer, in appropriate cases, may rebut the presumption. If the contract has a value of under $2 million, only the head of the activity can approve determinations and findings rebutting the presumption. In either situation, the bill would preseve SBA's right to appeal negative set-aside decisions.

(F) SPARE AND REPLACEMENT PARTS

The bill would severely restrict non-competitive sole source procurements of spare and replacement parts by an amendment to Section 15(b) of the Small Business Act. With the exception of the 8(a) program, a Federal agency would be permitted to solicit an offer or to negotiate with one source for spare parts only if the head of a buying activity certifies that one of five exceptions applies. Such certification would be required for each such sole source procurement. The five exceptions are as follows:

(1) The parts are available from only one source and no other business concern in capable of producing the same or like parts which are consistent with the legitimate needs of the agency;

(2) The need is of such urgency that serious injury would result to the agency's mission unless the parts or components are procured on a sole source basis;

(3) The disclosure of the agency's needs to more than one source would compromise the national security;

(4) A party has a "legitimate proprietary interest" in the parts or in their manufacture and legal liability would arise if the agency were to purchase similar parts from another party; or

(5) A statute requires that the parts be procured from a specific source or through another agency.

This section of the bill recognizes that in some situations, sole source procurement of spare parts is appropriate. While competitive procurement is generally preferred, agencies must have flexibility to use noncompetitive methods when necessary to meet special circumstances. Nowhere in present law, however, is there recited the criteria for the sole source award of spare parts. The bill would, for the first time, statutorily define the justifications for sole source awards and by so doing limit those purchases to occasions where they are clearly necessary.

The bill would encourage the break-out of as many contracts as possible by elevating to the head of a buying activity all decisions to procure parts on a non-competitive sole source basis.

It is the Committee's intent that replacement or spare parts under contracts for major systems acquisition be broken out for competition whenever possible. We believe this can be accomplished without sacrificing legitimate acquisition objectives such as quality, timely delivery, and security of sensitive data or other in-

formation. Nor does your Committee intend to violate the legitimate right of a business to have its trade secrets protected from unfair disclosure. In addition valuable procurement programs and opportunities established by statute, such as those authorized by sections 8 and 9 of the Small Business Act, are not affected by this provision of the bill. Nor would the government be precluded from purchasing a part or component from the patent holder on a sole source basis when such purchase serves a valid need.

Because of the complex nature of the data rights issue in spare parts purchases, the bill would require that reasonable guidelines be estalished to define the proprietary rights that may be claimed legitimately by a government contractor. Within 180 days after enactment of this bill, the Office of Federal Procurement Policy, which has already been given lead responsibility in promulgation of a uniform system of procurement, is required to formulate rules and regulations to be included in the Federal Acquisition Regulations which will define "legitimate proprietary interest" for purposes of this subsection. In the formulation of these rules and regulations, the bill would require the Office of Federal Procurement Policy to balance the interests of the Federal government and the private sector by giving due consideration to six enumerated criteria:

(1) Statements of congressional policy, purposes, and objectives contained in Public Law 97-219, the Small Business Innovation Development Act of 1982, Public Law 96-517, the University Small Business Patent Procedures Act, and section 8(d) of the Small Business Act favoring innovation and increased small business involvement in Federal purchases.

(2) The government's interest in increasing competition and lowering costs by developing and locating alternative sources of supply;

(3) The initiation of programs in appropriate agencies to promote the reverse engineering of spare or replacement parts for purpose of design replication to be used in subsequent offers to sell the same or like part to the government. Subject to restrictions imposed by agency heads for reasons related to national security, inventory needs, improbability of future procurements of the part, or by any other legal restriction, this program would make components or parts available to U.S. small business concerns by loan or purchase. It is anticipated that OFPP would provide a broad definition of "spare parts" for purposes of this program;

(4) The rights to technical or other data which is developed in whole or in part with Federal funds;

(5) A requirement that in situations involving major systems acquisitions, clauses be inserted in initial production contracts pertaining to rights in data developed in whole or in part with Federal funds. Such clauses shall provide, as appropriate, for the government's right to own, license, use, or access such data and the extent of proprietary interests, if any, retained by the contractor; and

(6) The imposition of remedial measures against those firms which improperly designate technical or other data as proprietary. Such measures should include investigation for possible

violations of Title 18, United States Code, or review to determine whether such a contractor remains "responsible" for the award of future contracts.

OFPP would be required to consult with representatives of associations representing small business concerns before issuing any rules or regulations pursuant to this subsection, and provide to the House and Senate Small Business Committees a detailed report as to how the rules and regulations reflect the six factors to be considered under this subsection.

(G) LABOR SURPLUS AREA PROCUREMENTS

The bill would give all agencies the same authorities to utilize labor surplus area procurements, as needed, to effectuate the purposes and policies of Defense Manpower Policy Number 4B. The bill does not specify what types of products are to be purchased under this procurement method and would, accordingly, leave those decisions totally within the discretion of the procuring agency. Therefore, judicious application of these authorities would not affect the purchase of "time-sensitive" or "strategic" items.

The bill would further require that an agency could not exercise its discretion by letting an LSA set-aside contract unless the contracting officer has a reasonable expectation that: (1) offers will be obtained from at least two responsible business concerns and (2) awards will be made at reasonable prices. It is your Committee's intent that nothing contained in this bill be interpreted as allowing an agency to award an LSA set-aside contract at an unreasonable price. Further, we believe it wholly inappropriate to conduct this program by adding pre-determined percent differentials to offers received from non-LSA firms, as is now being done by the Defense Logistics Agency pursuant to a LSA test program mandated the Congress. It is our intent that the DOD participate in this program as civilian agencies do. In this regard, once a procurement requirement has been identified as suitable for an LSA set-aside and there is a reasonable expectation that awards will be made at reasonable prices, the competition for that requirement should be restricted to firms which meet the LSA criteria. If the prices actually offered are, in fact, unreasonable, the award may not be made and the solicitation, accordingly, must be either cancelled or amended.

Your Committee expects that the "costs" of this program in DoD will be minimal. In fact, the first LSA test mandated by Congress between February 1981 and December 1982, resulted in the award of 35,770 contracts valued at $3.1 billion. A differential was paid on only 956 contracts (2.7 percent of the contracts) for a total preimum of $1.8 million or only .05 percent of the total value of all contracts awarded under the test.

The bill would also require that an LSA eligible firm agree to perform a substantial proportion of the production "in or near" a labor suplus area rather than "in" a labor surplus area, as is required by present law. This change is intended to avoid a situation when a firm, technically not in an SLA, is found ineligible even though most of its workforce does reside in the LSA. In one case brought to the attention of your Committee, a firm located just outside of an LSA border was found ineligible despite the fact that 80

percent of its employees live in the LSA. In any case where at least 50 percent of a firms' workforce resides in a LSA, the firm should be considered "in or near" a LSA.

Finally, the bill would make some technical changes in the order of set-aside priorities and would, for the first time, give the SBA appeal rights to challenge the priority for award selected by the contracting officer. These appeals would take the same procedural form as the traditional small business set-aside appeals.

(H) GOALS

In order to address the need for timely goal setting, the bill would mandate that each agency establish goals within the first sixty (60) calendar days of the fiscal year to which such goals pertain. The failure to comply with this requirement would then result in the SBA unilaterally imposing goals for the delinquent agency. Whenever SBA is required to so act, the bill would prevent the SBA from setting any goals which are lower than the goals the delinquent agency had in the immediately preceding fiscal year.

The bill would not change existing law with respect to having the Administrator of the OFPP resolve disputes between the SBA and the procuring agency prior to the expiration of the referenced sixty (60) day period. However, the bill would require SBA to act if goals are not in place after the sixty (60) day period, regardless of the pendency of any appeal with the OFPP. The SBA unilateral action authorized under this section of the bill would render moot any contemplated or pending appeal with OFPP. In such a situation, OFPP would lack the authority to act at all.

Your committee strongly believes that program goals, if properly formulated and used, are an extremely effective management tool. The present goal setting process, however, does not account for an estimated 20 percent of all federal contract awards to small business. The bill would correct this situation by making the goals applicable to all awards regardless of size.

Further, the bill would require that all goals be expressed as a percent of anticipated awards. In this manner, Congress would be able to track, on a constant basis, the share of the federal contract dollar performed by small business. While such goals are now expressed as percentages, some agencies have indicated to your Committee the desire to express goals solely in terms of dollars. Your Committee vehemently opposes this approach since it can be used to mask a steadily declining share of awards during periods of increasing procurement budgets. Since the statute is now silent on this issue, the bill would remove any possible discretion to convert from percent to dollar goals.

Finally, the bill would recognize the priority already afforded in law to labor surplus area awards and would, accordingly, extend goal setting to cover these types of contracts.

(I) CONTRACT PRESUMPTIONS

The bill would raise from $10,000 to $25,000 the value of contracts to be reserved exclusively for competition among small business concerns. As under present law, such reservations are to take place unless the contracting officer determines that he/she is or

would be unable to obtain offers from two or more small business concerns which are competitive with market prices, quality, and delivery.

In addition, the bill would clarify an ambiguity contained in present law. The statute now provides that the reserve take place if, among other things, the requirement "is subject to small purchase procedures." Technically, all military procurements of under $25,000 are "subject to small purchase procedures" even if those procedures are found inappropriate for the particular acquisition. Accordingly, the "subject to" phrase in section 15(j) of the Small Business Act (the subsection creating the reserve) appears to lack any practical meaning. Accordingly, the bill would delete the phrase "subject to small purchase procedures" while, of course maintaining the other tests pertaining to competitive prices, quality and delivery.

As stated under (d) above, the bill would establish criteria for the use of the small business set-aside program. These criteria would require that the contracting officer have a reasonable expectation that: (1) offers will be obtained from at least two responsible small business concerns offereing the products of different small business concerns; (2) awards will be made at reasonable prices; and (3) delivery of the goods or services will be rendered within the time needs of the using agency. Of course, these conditions may be determined satisfied, as appropriate, for any acquisition or class of acquisitions regardless of size, dollar value, sophistication, complexity or similar consideration.

The bill would, however, establish a rebuttable presumption that these criteria are met for acquisitions having an anticipated value of between $25,000 and $2,000,000. Your Committee believes it wholly reasonable to presume that, out of some 13 million small businesses in this country, there are at least two responsible concerns capable of submitting reasonable offers for most procurements within this size range. For those infrequent situations when a particular purchase may not meet these criteria, the bill provides that the presumption may be successfully rebutted by the head of the relevant buying agency in determinations and findings, which contain substantial reason to believe that the presumption is not warranted with respect to the particular contract. (It is to be noted that the determinations and findings under this provision of the bill may only relate to a "particular" contract and not to a class of contracts.)

While this provision of the bill, authorizing only the head of the activity to rebut the presumption, enjoys the strong support of the small business community, concerns have been expressed to your Committee by the bureaucracy about the potential paperwork burden this provision may generate. Your Committee, however, believes such concerns are totally unjustified.

One of the primary reasons for the lagging performance of the small business programs is the failure of those in charge of buying activities to manage aggressively such programs and to hold their subordinates accountable for poor performance. The subject provision of the bill is a reasonable approach designed to directly address these issues. First, the head of the activity would be constrained to manage these programs more aggressively if the ration-

ale for a negative set-aside decision in this dollar range of contracts had to be approved by him/her on an individual contract basis. Secondly, since the contracting officer, who made the negative set-aside determination, must prepare and submit the determinations and findings to the activity's head, personal accountability could be better maintained. Lastly, the paperwork burden, if any, would be reduced in direct proportion to the increase of set asides in this dollar range of contracts. In other workds, the more potential sources located (i.e. the more competition obtained), the less paperwork would result. It is your Committee's intent to alter the present procurement system by making it administratively easier to award a set-aside in the $25,000 to $2,000,000 range, than to elect a sole source method of procurement or any other method where fewer than two small business offers are expected to be received.

Of course, the bill would preserve SBA's present set-aside appeal rights for all negative set-aside and reserve decisions regardless of the anticipated dollar value of the award. Accordingly, SBA could appeal the decision of an activity head rebutting the presumption of set-aside for contracts with the $25,000 to $2,000,000 range.

(J) MISSREPRESENTATION OF SMALL BUSINESS STATUS

The bill would deter a contractor from making false representations to the Federal Government in order to obtain any type of contractual assistance under the Small Business Act. This would be accomplished by amending section 16(a) of the Small Business Act to obtain a contract or subcontract subject to the Small Business Act shall be punished by a fine of not more than $5,000, or imprisoned for not more than two years.

To further the intent of your Committee to discourage contractors from misrepresenting their size status to a procuring agency, we recommend that all procuring agencies insert a clause in their procurement forms quoting section 16(a) of the Small Business Act, as amended by this bill. The purpose of this action is to notify potential contractors of the consequences associated with misrepresenting their status as a small business cocnern.

It is further recommended that the Secretary of the Department of Commerce direct that proper notice be published in the Commerce Business Daily in close proximity to all advertisements for set-aside contracts.

CONCLUSION

This bill is the result of extensive analysis and study by your Committee. It is our conclusion that the Federal purchase system is in desperate need of additional competition and that our purchases are dangerously concentrated in the hands of a relatively few large business concerns and interests. Over the last 4½ years about 1 percent of the business population has received 83 percent of the Federal purchase dollar.

The bill would directly address this grave problem by removing artificial barriers to competition and, thereby, increase the ability of small business concerns to vie for Federal contract awards. This would be accomplished by revising the Certificate of Compe-

tency Program, removing anti-competitive pre-qualification standards, defining the criteria and uses of the small business set-aside program and by imposing stringent limitations on the use of sole-source contracts and limiting the formation of contract solicitations which prevent full participation by small business as prime contractors.

Your Committee believes that this bill presents an equitable, reasonable and inexpensive means of promoting competition through the increased use of small business concerns. If enacted, and forcefully implemented, this measure will both reduce acquisition costs and provide much needed assistance to this Nation's small business concerns.

Matters Required To Be Discussed Under House Rules

In compliance with clause 2(l)(2) of rule XI of the House of Representatives, the following statement is made relative to the vote on the motion to report H.R. 2133:

A majority of the committee voted in person and was actually present and the motion was approved by a recorded vote of 37 ayes and one nay.

In compliance with clause 2(l)(3) of rule XI of the Rules of the House of Representatives, the following statements are made:

With regard to subdivision (A), relating to oversight findings, the committee finds, in keeping with clause 2(b)(1) of rule X, that this legislation is in full compliance with the provision of this rule of the House which states:

> In addition, each such committee shall review and study and conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee. * * *

With regard to subdivision (B), relating to the statement required by section 308(a) of the Congressional Budget Act of 1974, the following statement is made relative to the legislation:

> Section 3(a)(2) of the Congressional Budget Act defines the term "tax expenditures" as those revenues losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction, from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.

None of the provisions of H.R. 2133 deals with taxation and thus, in your committee's opinion, this bill does not provide new or increased tax expenditures.

Section 3(a)(2) of the Congressional Budget Act defines the term "budget authority" as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds.

Under this definition, it is the final action of Congress that authorizes an agency to enter into obligations which constitutes new budget authority. In those cases which entail: (1) an authorization for an agency to undertake a program; (2) an authorization for appropriation of funds to permit that agency to enter into obligations; and (3) an acutal appropriation of such funds, it would be only the

final action of Congress in appropriating funds which constitutes the budget authority.

None of the provisions of H.R. 2133 appropriates funds and thus, in your committee's opinion, the bill does not provide new budget authority. Accordingly, no comparison of budget authority, outlays or tax expenditures or 5-year projections have been made.

With regard to subdivisions (C) and (D), the cost estimate of the Director of the Congressional Budget Office relative to H.R. 2133 was requested but not received.

No oversight findings or recommendations have been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 2133.

In compliance with clause 2(l)(4) the committee concludes that the provisions of this legislation in and of themselves will have no inflationary impact on prices and costs in the operation of the national economy.

In compliance with clause 7, rule XIII of the House of Representatives the committee makes the following statement:

The costs attributable to this bill for the current fiscal year and for fiscal years 1985–89 are expected to be offset by the increased competition in the procurement of goods and services. Your committee estimates that there will be no substantial direct expenditure of additional Federal funds, but that there may be additional administrative expenses concomitant to the performance of new duties needed to increase the number of competitive contract awards. However, it is your committee's belief that the savings from such awards will substantially exceed any reasonably anticipated expense and, therefore, that the bill will have a negative costs impact.

No cost estimate was submitted by any Government agency on H.R. 2133 to your committee.

In your committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

Section-by-Section Analysis

Section 1 of the bill would amend section 8(b)(7) of the Small Business Act which establishes the Certificate of Competency (CoC) program. The bill would prohibit SBA from refusing to accept a CoC referral made by a contracting officer. In addition, SBA could not deny a small business concern access to the CoC procedure because of the size of the contract or the nature of the work to be performed. This section also prohibits a Federal buying agency from denying a small business the opportunity to have its offers considered for a particular type of work solely because: (a) it is not on a qualified bidders list; (b) does not have its products on a "qualified products list"; or (c) has not been "prequalified" to submit offers from that particular type of work if the prequalification "test" would have been subject to normal CoC procedures had a particular contract been involved.

Section 2 of the bill would amend section 8(d) of the Small Business Act. It raises from $10,000 to $25,000 the value of a Federal contract which must include a clause requiring the prime contractor to provide the maximum practicable opportunity for small and

small disadvantaged business concerns to participate as subcontractors.

Section 3 of the bill would amend section 8(d) of the Small Business Act. Under present law SBA must submit annual reports to the Congres on subcontracting plans accepted by Federal agencies but which SBA has found deficient. This new section would require that each plan reported be identified by: (a) the contract number; (b) the name of the Federal buying activity; (c) the name of the contractor; and (d) the name of the contracting officer who accepted the plan.

Section 4 would amend section 15 of the Small Business Act.

Subsection (a) requires that a Federal contract, which is not suitable for the 8(a) program, shall be set-aside for small business concerns if the procurement officer has a reasonable expectation that: (1) offers will be obtained from two or more responsible small business concerns; (2) awards will be made at reasonable prices; and (3) delivery of the goods or services will be rendered in a timely fashion. SBA is given the right to appeal negative set-aside and breakout determinations, as well as the sole "sourcing" of spare and replacement parts, to the agency's Director of Small and Small Disadvantaged Business Utilization.

Subsection (b) provides that Federal agencies:

(1) Reduce the number of requirements contained in each of their solicitations so that small business is given an increased opportunity to compete for prime contract awards;

(2) Package construction solicitations in such a way that does not preclude a small business concern from obtaining a surety bond guarantee under the Small Business Investment Act. Under that Act, SBA can only guarantee surety contracts of $1,000,000 or less; and

(3) Shall not sole source awards for spare or replacement parts unless: (a) only one source is capable of producing those parts; (b) exigent circumstances warrant a sole source contract; (c) national security would be compromised; (d) a legitimate proprietary interest prevents a competitive procurement; or (e) a statute requires that the purchase be made from a specific source.

(4) The Office of Federal Procurement Policy is required under existing law to issue a uniform set of procurement regulations called the Federal Acquisition Regulations (FAR). This provision of the bill would require OFPP to include in the FAR rules and regulations defining "legitimate proprietary interest" for purposes of this subsection. When promulgating such regulations, OFPP must give due consideration to the following:

(a) statements of congressional policy, objectives and purposes contained in Public Law 96-517 (the Small Business-University Patent Procedures Act), Public Law 97-219 (the Small Business Innovation Development Act of 1982) and section 8(d) of the Small Business Act. Such statements relate to increasing competition, innovation, commercialization, and the utilization of small businesses in the Federal acquisition system;

(b) the need for competition and developing alternative sources of supply;

(c) mandating the initiation of reverse engineering programs by appropriate agencies allowing for the purchase or loan of

spare or replacement parts by U.S. small business firms for the purpose of design replication. The purchase/loan of specific parts could be restricted in situations when national security is a consideration, when the agency intends not to make future purchases of the same or like products, when inventory is low, or when it would be otherwise prohibited by law;

(d) defining the rights of technical data developed with Federal funds;

(e) a requirement that contracts for major system acquisitions contain clauses which designate the ownership of rights in data developed in whole or in part with Federal funds; and

(f) imposing sanctions against business concerns which improperly designate data as "proprietary."

Subparagraph (B) of this paragraph requires OFPP to consult with representatives of small business organizations before promulgating these rules and regulations, and to issue a report to House and Senate Small Business Committees, after the rules are issued, specifying how these six elements were considered.

(5) Commercial activities which are converted to contract and which have an anticipated value of over $2,000,000 must be set aside for either small business or for award pursuant to section 8(a) unless the contracting officer reasonably believes that the requirements of a set-aside or 8(a) award have not been met. (See explanation of subsection (e) of this section for awards of under $2,000,000.)

Subsection (c) authorizes labor surplus area set-asides if the contracting officer has a reasonable expectation that: (1) offers will be obtained from two or more responsible firms which will perform a substantial portion of the work in or near a labor surplus area, and (2) awards will be made at reasonable prices.

In carrying out the set-aside program, agencies shall award contracts according to the following priority:

(1) small business-labor surplus area set-asides;
(2) small business set-asides;
(3) small business-labor surplus area partial set-asides;
(4) small business partial set-asides; and
(5) labor surplus area set-asides.

Subsection (d) requires the head of each Federal agency to negotiate yearly procurement goals with the Small Business Administration. These goals pertain to small business concerns, small business concerns owned by the disadvantaged and labor surplus area business concerns. Whenever the SBA and the agency fail to agree on annual goals, the matter is referred to the Administrator of the Office of Federal Procurement Policy for final resolution.

Goals must be for both prime and subcontracts and must be expressed as a percent of anticipated awards.

Goals must be established within the first 60 calendar days of the fiscal year to which they pertain. If goals are not established within this time frame, the bill requires the SBA to unilaterally impose such goals. However, in such event, the imposed goals cannot be less than those which the agency had in the preceding year.

Subsection (e) raises from $10,000 to $25,000 the value of all Federal contracts which are to be reserved for small business concerns

unless the contracting officer cannot obtain reasonable offers from two to more responsible small business concerns.

With respect to contracts between $25,000 and $2,000,000 in anticipated value, the contracting officer is to presume that the requirements for a small business set-aside have been met or that award pursuant to section 8(a) is appropriate. This presumption can only be rebutted by the head of the buying activity in determinations and findings which contain substantial reason to believe that the presumption is not warranted. SBA has the right to appeal any negative determination made under this subsection.

In addition, this subsection would require contracting officers to choose a method of payment which minimizes paperwork and facilitates prompt payment to small business concerns.

Section 5 would amend section 16 of the Small Business Act to provide that anyone who knowingly makes a false statement in order to obtain a contract or subcontract under the Small Business Act shall be subject to a fine of not more than $5,000 or subject to imprisonment for not more than two years.

This section provides that nothing contained in this bill is intended to affect the Javits-Wagner-O'Day Act, which provides contracts to sheltered workships for the handicapped.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Small Business Act

* * * * * * *

Sec. 8. (a)(1) * * *

* * * * * * *

(b) It shall also be the duty of the Administration and it is hereby empowered, whenever it determin s such action is necessary—

(1) * * *

* * * * * * *

(7)(A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to

the provisions of section 35(a) of title 41, United States Code (the Walsh-Healey Public Contracts Act), he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final dispostion, in which case the Administration may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation.

(C) In any case in which a small business concern or group of such concerns has been certified by the Administration pursuant to (A) or (B) to be a responsible or eligible Government contractor as to a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility.

(D) The Administration shall not—

(i) refuse to accept and consider a referral from a Government procurement officer which is made pursuant to subparagraph (A) or (B); or

(ii) make such referral discretionary with such officer on any basis including, but not limited to, the anticipated dollar value of the contract, or the nature of the work to be performed: Provided, That nothing contained in this paragraph shall require the administration to process an application for certification if the small business, to which the referral pertains, declines to have its application processed.

(E) No small business concern shall be denied the opportunity to submit and have considered its offer for any contract to be let by any Federal agency solely because such concern—

(i) is not on a "qualified bidders list";

(ii) does not have its product or products on a "qualified products list"; or

(iii) has not received prior approval from a Federal agency to submit and have considered its offers relating to a certain nature of work or class of contracts if such prior approval is based upon a responsibility determination which would have been subject to subparagraph (A) were a specific contract under consideration and the matter referred to the administration.

(d)(1) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performce of contracts let by any Federal agency.

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which—

(A) does not exceed [*$10,000*] *$25,000;*

(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(C) is for services which are personal in nature.

* * * * * * *

(11) At the conclusion of each fiscal year, the Administration shall submit to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives a report on subcontracting plans found acceptable by any Federal agency which the Administration determines do not contain maximum practicable opportunities for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts described in this subsection. Each subcontracting plan contained in such report shall be identified by the relevant contract number, the name of the Federal buying activity, the name of the contractor, and the name of the Federal procurement officer who accpeted the plan.

* * * * * * *

SEC. 15. (a) To effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this Act shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. [Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.] *A procurement requirement, or any part thereof, which is not suitable for award pursuant to subsection (a) of section 8 shall be set aside for exclusive competition among small business concerns if the Government procurement officer has a reasonable expectation that (A) offers will be obtained from at least two responsible small business concerns; (B) awards will be made at reasonable prices; and (C) delivery of the goods or services will be rendered within the time needs of the procuring agency. Whenever the administration and the Government procurement officer fail to agree on any determination made pursuant to this subsection or subsections (b), (d), (e), (f) or (j), the Administrator shall submit the matter for a final determination to the officer or employee of the procuring agency who was appointed pursuant to subsection (k).*

[(b) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for

which a surety may be guaranteed against loss under section 411 of the Small Business Investment Act of 1958 (15 U.S.C. 694(b)), the contracting procurement agency shall, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work.]

(b)(1) Federal agencies shall, when feasible, reduce the number of anticipated requirements to be contained in each of its contract solicitations by an amount necessary to promote the maximum practicable opportunity for small business concerns to submit offers in response to such solicitations.

(2) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under section 411 of the Small Business Investment Act of 1985 (15 U.S.C. sec. 694(b)), the contracting procurement agency shall, to the extent practicable, place contracts so as to allow more than one small business concern to preform such work.

(3) No Federal agency shall solicit an offer from only one source or negotiate with only one source (other than pursuant to section 8(a) of this Act) for the purchase of space or replacement parts unless the head of the buying activity certifies, for each such procurement, that—

(A) the parts are available from only one source and no other business concern is capable of producing the same or like parts which are consistent with the legitimate needs of the agency;

(B) the agency's need for the parts is of such urgency that the mission of the agency would be seriously injured if it did not solicit or negotiate with only one source;

(C) the disclosure of the agency's needs to more than one source would compromise the national security;

(D) a party has legitimate proprietary interest in the parts or their manufacture and the agency would be legally liable to such party if it purchased the same or like parts from another party; or

(E) a statute requires that the parts be procured through another agency or a specific source.

(4)(A) Within one-hundred eighty days after the effective date of this paragraph, the Office of Federal Procurement Policy (or any successor agency) shall promulgate rules and regulations defining "legitimate proprietary interest" for purposes of this subsection. Such rules and regulations shall be promulgated as a part of the Federal Acquisition Regulations and shall give due consideration to the following—

(i) statements of policy, objectives, and purposes contained in Public Law 96-517, Public Law 97-219, and section 8(d) of this Act;

(ii) the governmental interest to increase competition and lower costs by developing and locating alternative sources of supply and manufacture;

(iii) directing appropriate purchasing agencies to establish reverse engineering programs which provide domestic small business concerns an opportunity to purchase or borrow spare or replacement parts from the government for the purpose of design replication or modification to be used by such concerns in the

submission of subsequent offers to sell the same or like parts to the government: Provided, That nothing contained in this clause shall limit the authority of an agency head to impose restrictions on such a program related to national security considerations, government inventory needs, the improbability of future procurements for the same or like parts, or any additional restriction otherwise imposed by law;

(iv) the rights to technical or other data which is developed in whole or in part with federal funds;

(v) a requirement that the procuring agency, with respect to each major system acquisition, insert a clause in the initial production contract pertaining to technical or other data developed in whole or in part with federal funds. Such clause shall contain provisions specifying, as appropriate, the government's right to own, license, use or otherwise access such data and the extent, if any, of proprietary interest maintained by the contractor; and

(vi) the imposition of appropriate remedial measures against business concerns which improperly designate technical or other data as proprietary.

(B) The Administrator of the Office of Federal Procurement Policy (or the head of any successor agency) shall—

(i) consult with representatives of associations representing small business concerns prior to issuing any rules or regulations pursuant to subparagraph (A); and

(ii) after the promulgation of such rules and regulations, submit to the Committees on Small Business of the House of Representatives and of the Senate a report detailing how such rules and regulations give due considerations to the factors described in (A)(i) through (vi).

(5)(A) Except as provided in subparagraph (B), when a Federal agency makes an affirmative decision for a conversion to contract of commercial activities which are not being presently performed by a private commercial source, such activities shall be—

(i) set aside for exclusive competition among small business concerns pursuant to subsection (a); or

(ii) awarded pursuant to section 8(a) of this Act.

(B) Individual commercial activities which the Government procurement officer reasonably determines do not satisfy the requirements of subsection (a) or are unsuitable for award pursuant to section 8(a) of this Act, may be awarded without regard to subparagraph (A): Provided, That nothing contained herein shall limit the rights of the Administrator to appeal such determinations pursuant to subsection (a) or section 8(a) of this Act: And Provided further, That contracts for commercial activities having an anticipated value of less than $2,000,001 shall be subject to the requirements of subsection (j).

(C) As used in this paragraph the terms "conversion to contract", "commercial activities", and "a private commercial source" shall have the same meaning as given those terms by Office of Management and the Budget Circular A-76 or any successor circular.

(c)(1) During fiscal years 1981, 1982, and 1983, public and private not-for-profit organizations eligible for assistance under section 7(h) of this Act shall be eligible to participate in programs authorized

under this section in an aggregate amount not to exceed $100,000,000 for each such year: *Provided,* That the Administrator shall monitor and evaluate such participation and in any case where the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped find that the participation of such organizations has or may cause severe economic injury to for-profit small businesses, the Administrator shall and is hereby authorized to direct and require every agency and department having procurement powers to take such actions as the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped may deem appropriate to alleviate the economic injury sustained or likely to be sustained by such for-profit small business.

(2) The Administration shall, not later than January 1, 1982, prepare and transmit to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives, a report on the impact of contracts awarded to such organizations on for-profit small businesses.

[(d) For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to concerns (small business) which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitale employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

[(e) In carrying out small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated:

[(1) concerns which are small business concerns and which are located in labor surplus areas, on the basis of a total set-aside;

[(2) concerns which are small business concerns, on the basis of a total set-aside;

[(3) concerns which are small business concerns and which are located in a labor surplus area, on the basis of a partial set-aside;

[(4) concerns which are small business concerns, on the basis of a partial set-aside.

[(f) After priority is given to the small business concerns specified in subsection (e), priority shall also be given to the awarding of contracts and the placement of subcontracts, on the basis of a total set-aside, to concerns which—

[(1) are not eligible under subsection (e);
[(2) are not small business concerns; and
[(3) will perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas.

[(g) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency having values of $10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination.]

(d) For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to small business concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or in or near labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4B (44 CFR chapter 1) or any successor policy shall be authorized if the Government procurement officer has a reasonable expectation that (1) offers will be obtained from at least two responsible business concerns and (2) awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern. No award of any contract referred to in this subsection shall be construed as being made for the purpose of relieving economic dislocations.

(e) In carrying out small business set-aside programs, Federal agencies shall award contracts and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated:

(1) concerns which are small business concerns and which are located in or near labor surplus areas, on the basis of a total small business-labor surplus area set-aside;

(2) concerns which are small business concerns, on the basis of a total small business set-aside;

(3) concerns which are small business concerns and which are located in or near a labor surplus area, on the basis of a partial small business-labor surplus area set-aside; and

(4) concerns which are small business concerns, on the basis of a partial small business set-aside.

(f) After priority is given to the small business concerns specified in subsection (e), priority also shall be given to the awarding of contracts and the placement of subcontracts, on the basis of a total labor surplus area set-aside, to business concerns which will perform a substantial proportion of the production on these contracts and subcontracts within areas of concentrated unemployment or underemployment in or near labor surplus areas.

(g)(1) The head of each Federal agency shall, after consultation with the administration, establish goals each year for the award of its procurement contracts and subcontracts to small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals and business concerns which perform a substantial proportion of their production within areas of concentrated unemployment or underemployment in or near labor surplus areas.

(2) Goals established under this subsection shall be jointly established by the administration and the head of each Federal agency and shall realistically reflect the maximum potential of those firms described in paragraph (1) to perform such contracts and to perform subcontracts under such contracts. Whenever the administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy (or the head of any successor agency) for final determination.

(3) Goals established pursuant to this subsection shall be separately established for both prime contracts and subcontracts of each Federal agency. Subject to the requirements of paragraph (4), such goals shall be expressed as a per centum of the total dollar amount of anticipated prime contract and subcontract awards.

(4) Goals established pursuant to this subsection shall be established within the first sixty calendar days of the fiscal year to which they pertain. If the goals are not established within such time period for an individual agency, the administration shall set the goals for such agency: Provided, That in no event shall any goal established pursuant to this paragraph be less than the goal for the immediately preceding fiscal year.

* * * * * * *

[(j) Each contract for the procurement of goods and services which has an anticipated value of less than $10,000 and which is subject to small purchase procedures shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased. In utilizing small purchase procedures, contracting officers shall, wherever circumstances permit, choose a method of payment which minimize paperwork and facilitates prompt payment to contractors.]

(j)(1) Each contract for the procurement of goods or services which has an anticipated value of $25,000 or less shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain reasonable offers from two or more responsible small business concerns.

(2)(A) With respect to each contract for the procurement of goods or services which has an anticipated value of more than $25,000 but less than $2,000,001, the Government contracting officer shall presume that—

(i) the criteria of subsection (a) for a small business set-aside have been met; or

(ii) the subject procurement is suitable for award pursuant to subsection (a) of section 8.

(B) The presumption established by subparagraph (A) may only be rebutted by the head of the relevant buying activity in determinations and findings which contain substantial reason to believe that the presumption is not warranted with respect to the particular contract.

(3) Nothing contained in this subsection shall limit the rights of the Administrator to appeal any determination pursuant to subsection (a) or section 8(a) of this Act.

(4) Contracting officers shall, to the maximum extent praticable, choose a method of payment which minimizes paperwork and facilitates prompt payment to small business concerns.

* * * * * * *

SEC. 16. (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this Act, *including any contract or any subcontract subject to the provisions of this Act,* shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

* * * * * * *

ADDITIONAL VIEWS OF HON. HAL DAUB

I regret that I cannot join with my colleagues today in support of these two measures, particularly H.R. 2133. I stand second to no Member in my support of the small business community and efforts to see that it receives a fair share of the procurement dollar. I understand that additional efforts might be necessary to confront a hostile bureaucracy but I do not believe this is the answer.

My concern with the pending legislation is that it fails to address the valid concerns of the Department of Defense and in all likelihood the legislation will be interdicted by sequential referral to other committees of the House. In other words, what good does it do for the small business community to process legislation that is unacceptable to others who must as well pass on the legislation.

The adversary relationship between the Department of Defense and those who seek to force upon them legislation dictating important aspects of their procurement process is a self-defeating one. If we sincerely want to help small business, if we want to insure competition, then it is our responsibility to work with the parties involved and develop solutions that are acceptable and will not be derailed at the next committee.

It is my hope that this legislation accomplishes what it sets out to do. Nothing could please me more. However I do not feel that we are accomplishing anything important when we produce legislation that is destined to failure, or at best, circumvention.

Additionally, I oppose the continued emphasis of some members of the committee on the concept of favored treatment for labor surplus areas. As Mr. Weber points out we have situations in this country where less affluent areas would be excluded from participation because the nature of their economies results in a lower insured unemployment rate.

I also am troubled by the need for additional employees to implement these new procedures. If the procedures cannot be implemented by existing personnel, if they cannot be accepted by the Department of defense voluntarily without new positions created to watchdog the process, then the procedures are not likely to be successful and all we are doing is adding another layer of bureaucracy to the process and, more importantly, delegating away from the Department the responsibility for these decisions. This only adds to the adversarial relationship which I believe harms the cause of small business more than its helps.

HAL DAUB.